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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 366

HAM SAY NAIM,

Appellant,

vs.

RUBY ELAINE NAIM,

Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT AS TO JURISDICTION

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No.

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v.

RUBY ELAINE NAIM, APPELLEE

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT AS TO JURISDICTION

Opinions Below

The opinion of the Supreme Court of Appeals of Virginia is unreported and is set forth, *infra*, at page 12. The Circuit Court of the City of Portsmouth, Virginia, filed no opinion.

Grounds on Which Jurisdiction Is Invoked

(i) *Nature of Proceeding*

This action was commenced by appellee in the Circuit Court of the City of Portsmouth, Virginia, for annulment of her marriage to the appellant. The statutes upon which the action is founded are Section 20-96 and Section 20-54,

Virginia Code, 1950, Act to Preserve Racial Integrity (Acts of Assembly, 1924).

(ii) *The Judgment Below*

The judgment for which review is sought was rendered by the Supreme Court of Appeals of Virginia on June 13, 1955, and entered in the office of the Clerk of the Supreme Court of Appeals of Virginia on June 13, 1955. The Notice of Appeal was filed on June 17, 1955, in the Supreme Court of Appeals of Virginia.

(iii) *Statute Believed to Confer Jurisdiction*

The statutory provision believed to confer jurisdiction of the appeal on this Court is Title 28, United States Code, Section 1257(2).

(iv) *Cases Believed to Sustain Jurisdiction*

Strauder v. *West Virginia*, 100 U.S. 303
Yick Wo v. *Hopkins*, 118 U.S. 356
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(v) *The State Statute Involved*

The appeal involves the validity of Section 20-54 of the Code of Virginia, 1950, which is part of "An Act to pre-

serve racial integrity," enacted by the General Assembly of Virginia and approved March 20, 1924 (Acts 1924, ch. 371). The section follows:

> "Intermarriage prohibited; meaning of term 'white persons'—
>
> "It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person who has no trace whatever of any blood other than Caucasian; but persons who have 1/16th or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter."

Questions Presented by the Appeal

1. May a state, consistent with the requirements of the equal protection and due process clauses of the 14th Amendment, annul the marriage of a Caucasian and a non-Caucasian solely because of the races of the parties?

2. Does the Circuit Court of the City of Portsmouth as an instrumentality of the State of Virginia have jurisdiction to annul the marriage of the parties upon the basis of their races?

3. Does Section 20-54 of the Code of Virginia, "Act to Preserve Racial Integrity," violate the provisions of the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

None of the facts involved in this appeal is in dispute. The appellant, a Chinese, and the appellee, a Caucasian, left the State of Virginia on June 26, 1952, to be married at Elizabeth City, North Carolina. They were married there on that day and immediately returned to Norfolk, Virginia, where they lived as husband and wife. The appellee, then a resident of Portsmouth, Virginia, on September 30, 1953, filed a bill for annulment of the marriage in the Circuit Court of the City of Portsmouth, Virginia, upon the ground that "the said marriage is void in law." The appellant thereafter moved that the bill for annulment be dismissed upon the ground, inter alia, that the marriage is not void in law because (1) it was valid in the state in which it was celebrated, namely, North Carolina; (2) the statutory prohibition against marriages between Caucasians and non-Caucasians was not applicable to the parties, as persons who were not domiciled in Virginia; and (3) the provisions of the Code of Laws of Virginia which prohibit intermarriage between Caucasians and those persons possessed with non-Caucasian blood are in violation of the Fourteenth Amendment to the Constitution of the United States.

A hearing on the Bill for Annulment and on the Pleas, Motion, and Answer of the defendant below was thereafter held in the Circuit Court of the City of Portsmouth. After hearing testimony that the parties were living in Virginia prior to their marriage, that they left the State of Virginia to be married in North Carolina because they knew that no marriage license would be issued to them in Virginia, that immediately following the marriage in North Carolina the parties returned to Virginia and lived as husband and wife, that the appellee was domiciled in Vir-

ginia, that the plaintiff below is Caucasian and that the defendant below is Chinese, the trial court overruled the appellant's motion to dismiss, to which exception was noted, and entered a decree annulling the marriage.

The appellant thereupon appealed to the Supreme Court of Appeals of Virginia and assigned the following as errors:

1. In failing to hold that the Circuit Court of the City of Portsmouth, as an instrumentality of the State of Virginia, is constitutionally without the power to annul the marriage of the parties herein upon the basis of race.

2. In failing to hold that the provisions of the Code of Laws of Virginia which make it unlawful for any white person in the State of Virginia to marry any save a white person are in violation of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Appeals of Virginia allowed the appeal and upon finding "that questions of public policy are or may be involved in the appeal," ordered that the Attorney General of Virginia be invited to file a brief amicus in the cause.

On June 13, 1955, the Supreme Court of Appeals of Virginia affirmed the decree of annulment.

Raising the Federal Questions

The federal questions presented by this appeal were timely raised in the Circuit Court of the City of Portsmouth by way of appellant's motion to dismiss the Bill for Annulment upon the ground that the statutory prohibitions against interracial marriages are in violation of the Fourteenth Amendment to the Constitution of the United States. In the Supreme Court of Appeals of Virginia, the federal questions were raised by way of the assignments of error set forth above.

The question of the constitutional power of the trial court

to grant a decree of annulment upon the basis of the races of the parties and the question of the constitutionality of the relevant section of the "Act to Preserve Racial Integrity," were necessarily passed upon by the trial court in granting the decree of annulment upon the sole basis that the appellee is a member of the Caucasian race and that the appellant is not a member of the white race.

The Supreme Court of Appeals of Virginia similarly passed upon these questions as is indicated in the following excerpts from its opinion:

> "The first assignment of error charges that the trial court was constitutionally without the power to annul the marriage upon the basis of race; in other words, that the court did not have requisite potential jurisdiction. This argument seems to be made in anticipation of a contention that was not made. . . . We need not linger over this first assignment because the remaining assignment of error presents the real issue —whether the statute in question is beyond the power of the State to enact under the Due Process and Equal Protection clauses of the Fourteenth Amendment." *Infra*, Page 14.

And further:

> "We're unable to read in the 14th Amendment to the United States Constitution or in any other provision of that great document, any words or any intendment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens.
>
> "We find there no requirement that the State shall not legislate to prevent obliteration of racial pride, but must permit the corruption of blood even though

it weaken or destroy the quality of its citizenship. Both sacred and secular history teach that nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own peculiar genius." *Infra*, pp. 18, 19.

The Federal Questions Are Substantial

1. The issue posed by this appeal—whether a state may restrict the right to marry upon the basis of race—has never been passed upon by this Court. Cf. *Pace* v. *Alabama*, 106 U.S. 583; *Jackson* v. *State*, 260 Ala. 698, 72 So. 2d 116, cert. denied, 348 U.S. 888.

2. The decision below poses a question fundamental to the interpretation and application of the Fourteenth Amendment, namely, whether marriage stands upon a different footing for the protections afforded by the equal protection and due process clauses of that Amendment than do the rights to follow a lawful occupation,[1] to serve on petit and grand juries,[2] to buy, sell and occupy real property without state-imposed segregation,[3] to vote in primary elections,[4] and to attend unsegregated public schools.[5] *Perez* v. *Sharp, sub nom. Perez* v. *Lippold*, 32 Cal. 2d 711, 198 P. 2d 17.

3. The right of a person to marry is basic to life and liberty and is a right guaranteed by the Fourteenth Amendment. *Meister* v. *Moore*, 96 U.S. 76, 81; *Meyer* v. *Nebraska*,

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[1] *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Truax* v. *Raich*, 239 U.S. 33; *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410.

[2] *Carter* v. *Texas*, 177 U.S. 442, 447; *Strauder* v. *West Virginia*, 100 U.S. 303, 306; *Norris* v. *Alabama*, 294 U.S. 587.

[3] *Buchanan* v. *Warley*, 245 U.S. 60; *Richmond* v. *Deans*, 37 F. 2d 712 (Cir. 4), affirmed by 281 U.S. 704 (per curiam).

[4] *Nixon* v. *Herndon*, 273 U.S. 536.

[5] *Brown* v. *Board of Education*, 347 U.S. 483; *Bolling* v. *Sharpe*, 347 U.S. 497.

262 U.S. 390, 399; *Skinner* v. *Oklahoma,* 316 U.S. 535, 541. But the Court below held that marriage is not a constitutionally protected right because it is a "social and domestic problem," rather than a "political or civil right":

> "It (the United States Supreme Court) has on numerous occasions invoked the provisions of the Fourteenth Amendment to invalidate State legislation with respect to political and civil rights, but it has not denied to the States the right to deal with their social and domestic problems and to legislate in regard to the marriage relation. On the contrary, it has been at pains to exclude that relation from the effects of its holdings." Pp. 19, 20, *infra.*

Whether viewed as a civil right or as a social institution, marriage obviously is such a fundamental relation that the question whether it is protected by the Fourteenth Amendment poses a substantial federal issue.

4. Assuming that the power to regulate the marriage relation, like all state powers, is limited by the inhibitions of the Fourteenth Amendment, *Southern Ry. Co.* v. *Virginia,* 159 Va. 779, 290 U.S. 190, 196, the further question, in view of the historic purpose of that Amendment, as well as its express language, *Slaughter-House Cases,* 83 U.S. 36, is whether the "preservation of the racial integrity" of the white race [6] is a purpose within the competency of the state to effect. *Meyer* v. *Nebraska,* 262 U. S. 390, 399; *Buchanan* v. *Warley,* 245 U. S. 69, 81.

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[6] It must be assumed that the Virginia legislature had no interest in preserving the "racial integrity" of its other dominant racial group, the Negroes (who constitute 22.1% of the State's population, U.S. Census, 1950), because all non-Caucasians may marry among each other without restraint. Indeed, one who has a "trace whatever" of non-Caucasian blood (excepting 1/16th or less of American Indian blood) and so who may be said to be "99 and 44/100 percent pure" may intermarry without restriction.

5. The question presented by this appeal is of more than isolated significance in view of the fact that 28 states [7] impose racial limitations upon the right to marry.[8]

The criteria of racial ineligibility vary among the states. Each of the statutes forbids the marriage of white persons to Negroes, who are variously defined as persons having from "one-fourth or more Negro blood" to "one drop of Negro blood." A number of the statutes prohibit intermarriage between whites and Mongolians; of these several limit the interdiction to Chinese and Japanese. A few states forbid intermarriage between whites and Indians, while others apply the prohibition to Negroes and Indians. North Carolina permits some Indians to marry non-whites, but the Cherokee Indians of Robeson County may not marry Negroes. Of all the statutes, the Virginia law is the broadest in its scope.

6. The Virginia statute, together with the other 27 laws prohibiting interracial marriages, has an important effect upon the administration of the federal immigration and nationality laws. *Truax* v. *Raich*, 239 U. S. 33, 42; *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, 416. If a marriage between an American citizen or a resident alien, and an immigrant alien is void, neither the immigrant alien spouse, nor any minor children are entitled to a nonquota or preference quota status for purposes of immigration. 8

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[7] California previously had such a statute, but it was invalidated as being contrary to the 14th Amendment. *Perez* v. *Sharp*, 32 Cal. 2d 711, 198 P. 2d 17 (sub nom. *Perez* v. *Lippold*) (1948). Oregon's statute was repealed in 1951. Chapter 455, Oregon Laws, 1951.

[8] For summaries of the state legislation, see Vernier, American Family Laws, Vol. I, Sec. 44, pp. 206-208; "Anti Miscegenation Laws in the United States," 1 Duke Bar Journal, 26-41 (1951); "Interracial Marriage: A Survey of Statutes and Their Interpretations," 1 Mercer Law Review, 83 (1949); "Intermarriage with Negroes—A Survey of State Statutes," 36 Yale Law Journal 858 (1927); Murray, Pauli, States' Laws on Race and Color, Page 18 (1950); Mangum, Charles S. Jr., The Legal Status of the Negro, Chapter 1 (1940).

U.S.C. 1101(27)(a), 1153(a)(3), (4). The immigrant alien spouses and children of marriages, which are void by reason of racial ineligibility, are therefore barred from receiving non-quota or preference quota immigration visas to enable them to migrate to the United States. 37 Op. Atty. Gen. 102 (1933); Immigration Manual, United States Immigration and Naturalization Service, Section 219.8(b), p. 2021.1; Nationality Manual, Immigration and Naturalization Service, page 9012.

The enforcement of racial prohibitions imposed upon marriage by the states thus operates to deny immigration [9] to the United States of Caucasian aliens who have married non-Caucasian citizens or residents of the United States, and of non-Caucasian aliens who have married Caucasian citizens, or residents as well as the children of such marriages.

Statistics are not available to show marriage by race among the non-quota and preference quota immigrant spouses and children, but the amount of such immigration is considerable. See Senate Report No. 1515, 81st Congress, 2nd Session, pp. 460, 461 (1950). Annual Report, Immigration and Naturalization Service, Tables 3 and 6, 1954.

Conclusion

For the reasons given, this appeal poses manifestly substantial federal questions which have never before been passed upon by this Court. They are of such importance, not merely to the Commonwealth of Virginia, but to more than half of the states in the United States and to the Federal Government in its administration of the immigration and nationality laws, that the issues should be resolved by plenary consideration by this Court. It is urged that

[9] Except under what may be a nonexistent opportunity as quota immigrants.

probable jurisdiction be noted and the case be set down for argument.

Respectfully submitted,

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APPENDIX

The Opinion Below

SUPREME COURT OF APPEALS OF VIRGINIA

Present: All the Justices,

HAM SAY NAIM

v.

RUBY ELAINE NAIM

Opinion by Justice Archibald C. Buchanan, Richmond, Virginia, June 13, 1955.

Record No. 4368

FROM THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

Floyd E. Kellam, Judge

This is an appeal from a decree of the court below holding the marriage between the appellant and the appellee to be void under § 20-54 of the Code of Virginia, 1950, which is part of "An Act to preserve racial integrity," enacted by the General Assembly and approved March 20, 1924 (Acts 1924, ch. 371).

The material facts are not in dispute. The suit was brought by the appellee, who is a white person, duly domiciled in Virginia. The appellant is a Chinese and was a non-resident of the State at the time of the institution of the suit. On June 26, 1952, they left Virginia to be married in North Carolina. They were married in that State and immediately returned to Norfolk, Virginia, where they lived together as husband and wife. It is conceded that they left Virginia to be married in North Carolina

for the purpose of evading the Virginia law which forbade their marriage.

The Virginia statute, § 20-54, in effect at the time of the marriage, is as follows:

> "It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter."

Virginia statutes regarding the intermarriage of white and colored persons in effect at the date of the marriage, and now in effect, provide that all marriages between a white person and a colored person shall be absolutely void (§ 20-57); that if a white person and a colored person go out of the State for the purpose of being married and with the intention of returning, and after being married return and reside here, and cohabit as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. Section 20-59 provides that they shall be guilty of a felony and confined in the penitentiary for not less than one nor more than five years.[10]

---

[10] Other sections of the Virginia Code prohibit marriages of persons within certain degrees of consanguinity and affinity, bigamist marriages, marriage of insane, epileptic or feeble-minded persons; of habitual criminals and of persons under a prescribed minimum age. Title 20, Chapter 3, Code 1950.

As stated in appellant's brief, the only question at issue is whether the marriage of the appellant and appellee could be annulled on the ground of their racial ineligibility to marry one another.

The first assignment of error charges that the trial court was constitutionally without the power to annul the marriage on the basis of race; in other words, that the court did not have requisite potential jurisdiction. This argument seems to be in anticipation of a contention that was not made by the Commonwealth, which appears *amicus curiae*, the appellee not appearing on this appeal. We said in *Pretlow* v. *Pretlow*, 177 Va. 524, 548-9, 14 S. E. 2d 381, 387, that "annulment rests within the inherent power of equity;" but of course if the Federal Constitution forbids the enforcement of the statute under which the court acted, it likewise forbids the enforcement of the same prohibition by independent judicial action. "A State acts by its legislative, its executive or its judicial authorities. It can act in no other way." *Ex Parte Virginia*, 100 U.S. 339, 347, 25 L. ed. 676, 679. "The judicial act of the highest court of the state, in authoritatively construing and enforcing its laws, is the act of the state." *Twining* v. *New Jersey*, 211 U.S. 78, 29 S. Ct. 14, 53 L. ed. 97; *Shelley* v. *Kraemer*, 334 U.S. 1, 15, 68 S. Ct. 836, 842-3, 92 L. ed. 1161, 3 A.L.R. 2d 441.

We need not linger over this first assignment because the remaining assignment of error presents the real issue —whether the statute in question is beyond the power of the State to enact under the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Marriage, the appellant concedes, is subject to the control of the States. Nearly seventy years ago the Supreme Court said, and it has said nothing to the contrary since: "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization

of a people than any other institution, has always been subject to the control of the Legislature." *Maynard* v. *Hill*, 125 U.S. 190, 31 L. ed. 654, 657, 8 S. Ct. 723. And nine years before that: "Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal." *Reynolds* v. *United States*, 98 U.S. 145, 25 L. ed. 244, 250. That case was written by Chief Justice Waite, who said, in upholding a conviction of bigamy against a defense on the ground of the religious practice of polygamy authorized by the defendant's church, "it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life."

In the same year, 1878, it was written by this court, in *Kinney* v. *Commonwealth*, 71 Va. (30 Gratt.) 858, 862:

> "There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. The right to regulate the institution of marriage; to classify the parties and persons who may lawfully marry; to dissolve the relation by divorce; and to impose such restraints upon the relation as the laws of God, and the laws of propriety, morality and social order demand, has been exercised by all civilized governments in all ages of the world." See also Ex Parte Kinney, 3 Hughes 1, 14 Fed. Cas. 602, 3 Va. Law J. 370.

More recently, in *Wood* v. *Commonwealth*, 159 Va. 963, 965, 166 S. E. 477, this court said "that the preservation

of racial integrity is the unquestioned policy of this State, and that it is sound and wholesome, cannot be gainsaid." And in *Toler* v. *Oakwood &c. Corp.*, 173 Va. 425, 434, 4 S.E. 2d 364, 368:

> "There can be no question of the public policy of Virginia with reference to miscegenation."

In *State* v. *Gibson*, 36 Ind. 389, 10 Am. Rep. 42, a statute prohibiting the intermarriage of negroes and white persons was held not to violate any provision of the Fourteenth Amendment or the Civil Rights laws. In the course of a well-reasoned and well-supported discussion of the powers retained by and inherent in the States under the Constitution, the court said:

> " * * * In this State marriage is treated as a civil contract, but it is more than a mere civil contract. It is a public institution established by God himself, is recognized in all Christian and civilized nations, and is essential to the peace, happiness, and well-being of society. * * * The right, in the states, to regulate and control, to guard, protect, and preserve this God-given, civilizing, and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the states suffer or permit any interference therewith. If the federal government can determine who may marry in a state, there is no limit to its power. * * * ." 36 Ind. at 402-3.

It was said in that case that the question was one of difference between the races, not of superiority or inferiority, and that the natural law which forbids their intermarriage and the social amalgamation which leads to a corruption of races is as clearly divine as that which

imparted to them different natures.

In *Green* v. *State,* 58 Ala. 190, 29 Am. Rep. 739, the question was whether the State could make the marriage of a white person with a person of the colored race a punishable offense. The court held that the State had and retained that power; that while marriage was a contract, it was one of a peculiar character and subject to peculiar principles, the most interesting and important in its nature of any in society, and not embraced in the constitutional interdiction of legislative acts impairing the obligation of contracts. Manifestly, said the court, it is for the peace and happiness of the colored race, as well as of the white, that laws prohibiting intermarriage of the races should exist, and "How, then, can it be maintained that the States of this Union, in adopting amendments which make no allusion to such intermarriages, intended to deprive themselves of the important power of regulating matters of so great consequence and delicacy within their own borders for themselves, as it always was their undoubted right to do." 29 Am. Rep. at 743.

In 36 Am. Jur., Miscegenation, § 3, p. 452, it is said:

> "In accordance with the power of every country to make laws regulating the marriage of its own subjects, to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying, it is considered as well settled that although miscegenation statutes have been persisently attacked on the ground that they are violative of the United States Constitution, they nevertheless constitute a proper exercise of the power of each state to control its own citizens. * *."

More than half of the States of the Union have miscegenation statutes. With only one exception they have

been upheld in an unbroken line of decisions in every State in which it has been charged that they violate the Fourteenth Amendment: *State* v. *Pass*, 59 Ariz. 16, 121 P. 2d 882; *Dodson* v. *State*, 61 Ark. 57, 31 S. W. 977; *Jackson* v. *Denver*, 109 Colo. 196, 124 P. 2d 240; *Scott* v. *Georgia*, 39 Ga. 321; *State* v. *Jackson*, 80 Mo. 175, 50 Am. Rep. 499; *State* v. *Kennedy*, 76 N. C. 251, 22 Am. Rep. 683; *In Re Shun T. Takahashi's Estate*, 113 Mont. 490, 129 P. 2d 217; *In Re Paquet's Estate*, 101 Ore. 393, 200 P. 911; *Lonas* v. *State*, 3 Heiskell (50 Tenn.) 287; *Frasher* v. *State*, 3 Tex. App. 263, 30 Am. Rep. 131.

The exception is California, where a divided court held to the contrary with three of the seven judges dissenting, in *Perez* v. *Sharp*, 32 Cal. 2d 711, 198 P. 2d 17 (sub nom. *Perez* v. *Lippold*). In one of the two concurring opinions it was pointed out that since California recognized a marriage performed in another State between persons of the white and colored races, such marriage could not be considered vitally detrimental to public health and morals, and that the California statutes forbidding miscegenetic marriages were distinguished from such statutes in other States in that they were entirely declaratory, while all the others carried with them punishments for violations, indicating an attitude of comparative indifference on the part of the California legislature and the absence of any clearly expressed sentiment or policy. However that may be, the holding is contrary to the otherwise uninterrupted course of judicial decision, both State and Federal, as pointed out in the dissenting opinion, with which we agree.

Stevens v. *United States*, 10 Cir. 146 F. 2d 120, involved the validity of an Oklahoma statute which forbade the marriage of a person of African descent to any person not of such descent, or the marriage of any person not of African descent to a person of such descent, violation of

which was punishable as a felony and the marriage declared in effect to be a nullity. The statute was challenged by the party of African descent on the ground that it violated the Fourteenth Amendment. The court held:

> "• • • Marriage is a consentient covenant. It is a contract in the sense that it is entered into by agreement of the parties. But it is more than a civil contract between them, subject to their will and pleasure in respect of effects, continuance, or dissolution. It is a domestic relation having to do with the morals and civilization of a people. It is an essential institution in every well organized society. It affects in a vital manner public welfare, and its control and regulation is a matter of domestic concern within each state. A state has power to prescribe by law the age at which persons may enter into marriage, the procedure essential to constitute a valid marriage, the duties and obligations which it creates, and its effects upon the property rights of both parties. Maynard v. Hill, 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654. And within the range of permissible adoption of policies deemed to be promotive of the welfare of society as well as the individual members thereof, a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment. • • •"
> 146 F. 2d at 123.

From the *Slaughter-House Cases*, (1873), 16 Wall. (83 U. S.) 36, 21 L. ed. 394, to *Brown* v. *Board of Education*, (1954), 347 U. S. 483, 74 S. Ct. 686, 98 L. ed. 873, 38 A.L.R. 2d 1180, and *Bolling* v. *Sharpe*, 347 U. S. 497, 74 S. Ct. 693, 98 L. ed. 884, the Supreme Court has made no decision at variance with the holding in the *Stevens* case. It has on

numerous occasions invoked the provisions of the Fourteenth Amendment to invalidate State legislation and decision with respect to political and civil rights, but it has not denied to the States the right to deal with their social and domestic problems and to legislate in regard to the marriage relation. On the contrary, it has been at pains to exclude that relation from the effects of its holdings.

In *Pace* v. *Alabama*, 106 U. S. 583, 1 S. Ct. 637, 27 L. ed. 207, an Alabama statute provided that if a white person and a negro intermarried or lived in adultery or fornication with each other, they should be imprisoned in the penitentiary. Another statute provided smaller punishment for any man and woman who lived together in adultery or fornication. A white woman and Pace, a negro, were convicted under the first-mentioned statute and Pace appealed, claiming that the statute was in conflict with the Equal Protection clause of the Fourteenth Amendment. In affirming the conviction the court said: "Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others, to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment." It was held that there was no discrimination against either race in the statute; that "Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same."

In *Plessy* v. *Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 L. ed. 256, 259, the court said:

> "Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the

freedom of contract, and yet have been universally recognized as within the police power of the state. * * *."

Again in *Buchanan* v. *Warley*, 245 U. S. 60, 38 S. Ct. 16, 19, 20, 62 L. ed. 149, in speaking of the Civil Rights statutes enacted under the Thirteenth and Fourteenth Amendments, the court stated: "These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color." And further: "The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person."

Shelley v. *Kraemer*, *supra*, likewise recognized the distinction between social legislation and the rights intended to be protected by the Fourteenth Amendment in these words:

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. * * *." 68 S. Ct. at 847.

Brown v. *Board of Education*, *supra*, reached its conclusion that segregation in the public schools was contrary to the Equal Protection clause on the basis that education

is perhaps the most important function of State and local governments, "the very foundation of good citizenship," and that the opportunity to acquire it, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

No such claim for the intermarriage of the races could be supported; by no sort of valid reasoning could it be found to be a foundation of good citizenship or a right which must be made available to all on equal terms. In the opinion of the legislatures of more than half the States it is harmful to good citizenship.

In the same tenor *Bolling* v. *Sharpe, supra,* pointed out that as long ago as 1896 the court declared the principle that the Constitution forbids, "so far as civil and political rights are concerned," discrimination against any citizen because of his race. In respect to the question of due process of law, the court said that "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."

It is the considered opinion of the people of more than half of the States of the Union that the prohibition against miscegenetic marriages is a proper governmental objective, and all the courts which so far have dealt with the question, with the one exception noted, have held that that is so.

As recently as November 22, 1954, the Supreme Court denied a petition for *certiorari* to the Court of Appeals of Alabama in the case of *Jackson* v. *State,* 37 Ala. App. 519, 72 So. 2d 114, in which *certiorari* had likewise been denied by the Supreme Court of Alabama. 260 Ala. 698, 72 So. 2d 116, 348 U. S. 888, 75 S. Ct. 210. In that case the appellant had been convicted under the Alabama miscegenation statute which made it a felony for any white person and any negro or the descendant of any negro to intermarry

or live in adultery or fornication with each other. The conviction was affirmed against the contentions that the statute denied to the appellant, a negro, "her constitutional right and privilege of intermarrying with a white male person," and that it violated the Privileges and Immunities, the Due Process and the Equal Protection clauses of the Fourteenth Amendment.

If the prevention of miscegenetic marriages is a proper governmental objective, and within the competency of the State to effect, which we hold it to be, then § 20-54 of the Code, *supra*, under attack, is a valid enactment unless the classification made by the statute is arbitrary and without reasonable relation to the purpose intended to be effected. As was said in *Purity Extract &c. Co.* v. *Lynch*, 226 U. S. 192, 33 S. Ct. 44, 46, 47, 57 L. ed. 184: "It is also well established that, when a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective." And again: "The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat."

The only way by which the statute could be made effective was by classification of the races. If preservation of racial integrity is legal, then racial classification to effect that end is not presumed to be arbitrary.

It does not appear from this record that the appellant questioned the reasonableness of the classification in the trial court. There is no evidence in the record suggesting that the classification made by the statute is unreasonable or that it is not reasonably related to the purpose intended to be accomplished. In the absence of all evidence to the contrary, the presumption of reasonableness is very strong.

"* * * When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. * * *." *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 55 S. Ct. 187, 192, 79 L. ed. 281.

Such is the established rule in this Commonwealth as well as in all other jurisdictions. *Martin's Ex'rs.* v. *Commonwealth*, 126 Va. 603, 102 S. E. 77; *Bowman* v. *Virginia State Entomologist*, 128 Va. 351, 105 S. E. 141; *Joy, et al.* v. *Green*, 194 Va. 1003, 76 S. E. 2d 178; *Bray* v. *County Board*, 195 Va. 31, 77 S. E. 2d 479; 12 Am. Jur., Constitutional Law, § 521, p. 214; 16 C.J.S., Constitutional Law, § 99, p. 250.

The institution of marriage has from time immemorial been considered a proper subject for State regulation in the interest of the public health, morals and welfare, to the end that family life, a relation basic and vital to the permanence of the State, may be maintained in accordance with established tradition and culture and in furtherance of the physical, moral and spiritual well-being of its citizens.

We are unable to read in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intendment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizen-

ship. Both sacred and secular history teach that nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own peculiar genius.

Regulation of the marriage relation is, we think, distinctly one of the rights guaranteed to the States and safeguarded by that bastion of States' rights, somewhat battered perhaps but still a sturdy fortress in our fundamental law, the tenth section of the Bill of Rights, which declares: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The decree appealed from is

Affirmed.

The Judgment Below

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH, ON THE 19TH DAY OF FEBRUARY, 1954.

RUBY ELAINE NAIM, COMPLAINANT,

vs.

HAM SAY NAIM, DEFENDANT.
IN CHANCERY.

This cause came on this day to be heard on the bill of complaint, the defendant's answer, evidence heard in open court, and argument of counsel for both parties. It appearing to the court that the complainant is a member of the Caucasian race and the defendant not of the white race, and complainant is an actual bona fide resident of and domiciled in the State of Virginia, and has been for more than one year next preceding the commencement of this

action, and was residing in this City at the time of the institution of this suit; the defendant is a non-resident; that the parties left the State of Virginia on the 26th day of June, 1952, for Elizabeth City, North Carolina, to enter into a marriage, and immediately returned to this State and lived together as husband and wife. It is Adjudged, Ordered and Decreed that the marriage of the parties on June 26, 1952, in Elizabeth City, N. C., is void. That defendant pay to Bangel, Bangel & Bangel an attorneys fee of $200.00, and the cost of these proceedings.

A copy, teste: Kenneth A. Bain, Jr., Clerk.

By: Doris V. Mayor, D. C.

Proof of Service

I, David Carliner, attorney for Ham Say Naim, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the — day of August, 1955, I served a copy of the foregoing Statement as to Jurisdiction on Ruby Elaine Naim, appellee herein as follows:

By mailing a copy, in a duly addressed envelope, with postage paid to A. A. Bangel, Esq., her attorney of record, at his office at Law Building, Portsmouth, Virginia.

DAVID CARLINER,
Attorney for Appellant,
902 Warner Building,
Washington 4, D. C.

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SEP 29 1955
HAROLD B. WILLEY, Cler

In the

Supreme Court of the United States

October Term, 1955

No. 366

HAM SAY NAIM,

Appellant

v.

RUBY ELAINE NAIM,

Appellee

Appeal from the Supreme Court of Appeals of Virginia

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

A. A. BANGEL
Bangel, Bangel and Bangel
Law Building
Portsmouth, Virginia
Attorney for Appellee

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In the

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October Term, 1955

No. .....

HAM SAY NAIM,

Appellant

v.

RUBY ELAINE NAIM,

Appellee

Appeal from the Supreme Court of Appeals of Virginia

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee, believing that the matters set forth herein will demonstrate the lack of substance in the question presented by this appeal, files this statement in opposition to the appellant's statement as to jurisdiction. The appellee includes her motion to dismiss the appeal or affirm the order of the court below on the ground that the federal question raised on behalf of the appellant is so unsubstantial as to obviate further argument. The matters here relied upon are more particularly stated below.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

The appellant contends that §20-54 of the Code of Virginia is repugnant to the Constitution of the United States. That section of the Code of Virginia reads as follows:

> "It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter."

B. Statement of the Case and the Proceedings Below

1. On June 26, 1952, the appellant and the appellee left the State of Virginia to be married in Elizabeth City, North Carolina. The marriage ceremony was performed and the parties immediately returned to Virginia where they lived together as husband and wife.

2. The appellee, Ruby Elaine Naim, is a member of the Caucasian race; the appellant, Ham Say Naim, is Chinese, a member of the Mongolian race.

3. The appellee was domiciled in Virginia at the time of and for more than one year prior to the institution of this divorce suit; the appellant is a nonresident of Virginia.

4. There were no children born of the marriage.

5. On the 30th day of September, 1953, the appellee, Ruby Elaine Naim, filed a petition for annullment, or in the alternative for divorce, in the Circuit Court of the City of Portsmouth, Virginia, on the ground that the marriage was void in law, and on the ground that the appellant committed adultery on the 7th and 8th of September, 1952.

6. The cause came to be heard *ore tenus* in the Circuit Court of the City of Portsmouth on February 19, 1954. The said Court entered an order on that day that the marriage of the appellant and the appellee, celebrated in Elizabeth City, North Carolina on June 26, 1952, was void.

7. On the 6th day of October, 1954, the Supreme Court of Appeals of Virginia granted an appeal to the appellant. The case was heard by the said Court on April 25, 1955. On June 13, 1955, the Supreme Court of Appeals of Virginia affirmed the decree of the Circuit Court of the City of Portsmouth.

C. The Question Presented

1. Is §20-54 of the Code of Virginia repugnant to the Fourteenth Amendment of the Constitution of the United States.

II

ARGUMENT

The Virginia Statute Is Not On Its Face Repugnant To The Fourteenth Amendment To The Constitution Of The United States

The only question raised by the appellant in the trial court which was passed upon by that Court and the Supreme Court of Appeals of Virginia, and which is now presented to this Court, is whether or not the miscegenation statute of Virginia is unconstitutional on its face. At no stage of the proceedings in either of the State Courts did appellant

raise the issue of the reasonableness of the classifications established by Section 20-54 of the Code of Virginia. Not a single item of evidence was presented during the proceedings below, and none is contained in the purely formal six page record in this case, to indicate that the statutory classification is unreasonable and thus has no rational relationship to the health, safety and welfare of the State; nor is there any evidence in the record of this case to indicate that interracial marriages are not inimical to the public welfare and thus not properly subject to regulation by the State. Commenting upon this patent deficiency in the record, the Supreme Court of Appeals of Virginia in its decision in the instant case observed:

> "It does not appear from this record that the appellant questioned the reasonableness of the classification in the trial court. There is no evidence in the record suggesting that the classification made by the statute is unreasonable or that it is not reasonably related to the purpose intended to be accomplished. In the absence of all evidence to the contrary, the presumption of reasonableness is very strong." 196 Va., at .....

Counsel respectfully submit that this Honorable Court should not intervene in the present case where the critical issue of the reasonableness of the legislative classification and the necessity for regulation are highlighted by an evidentiary vacuum. As this Court has repeatedly pointed out:

> "* * * When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a *resort to common knowledge or other matters which may be judicially noticed, or to other*

*legitimate proof, that the action is arbitrary * * *.*" (Italics supplied.) *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194. See also, *O'Gorman and Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251.

Appellant concedes that marriage is subject to regulation by the State. Nearly seventy years ago this Honorable Court held: "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature." *Maynard* v. *Hill*, 125 U. S. 190. And nine years before that: "Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. *Reynolds* v. *United States*, 98 U. S. 145. Moreover, "* * * the regulation of the incidents of the marital relation involves the exercise by the States of powers of the most vital importance". *Sherrer* v. *Sherrer*, 334 U. S. 343.

The rule respecting the constitutionality of miscegenation statutes is well stated in 36 Am. Jur., Miscegenation, Section 3, page 452, in the following language:

> "In accordance with the power of every country to make laws regulating the marriage of its own subjects, to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying, it is considered as well settled that although miscegenation statutes have been persistently attacked on the ground that they are violative of the United States Constitution, they nevertheless constitute a proper exercise of the power of each state to control its own citizens * * *."

More than half the States of the Union have enacted miscegenation statutes. With only one exception, they have been upheld in an unbroken line of decisions in every state in which it has been charged that they violate the Fourteenth Amendment to the United States Constitution. *State* v. *Pass*, 59 Ariz., 16, 121 P. 2d. 882; *Jackson* v. *Denver*, 109 Colo. 196, 124 P. 2d. 240; *Dodson* v. *State*, 61 Ark. 57, 31 S. W. 97; *State* v. *Gibson*, 36 Ind. 389; *Scott* v. *Georgia*, 39 Ga. 321; *State* v. *Kennedy*, 76 N. C. 251; *State* v. *Jackson*, 80 Mo. 175; *In re Poquet's Estate*, 101 Ore. 393, 200 P. 911; *Lonas* v. *State*, 3 Heisell (50 Tenn.) 287; *Frasher* v. *State*, 3 Tex. App. 263; *Re Shun T. Takahashi's Estate*, 113 Mont. 490, 129 P. 2d. 217; *Ex Parte Francois*, 3 Woods 367 (5th Cir. 1879); *Hoover* v. *State*, 59 Ala. 190; *Pace and Cox* v. *State*, 69 Ala. 231, 106 U. S. 583; *Wilson* v. *State*, 20 Ala. App. 137, 101 So. 417; *Jackson* v. *State*, 37 Ala. App. 519, 72 So. 2d. 114, cert. den. 260 Ala. 698, 72 So. 2d. 116, cert. den., 348 U. S. 888; *Stevens* v. *United States*, 146 F. 2d. 120 (10th C. C. A.).

The exception is California, where a divided court held to the contrary, with three of the seven judges dissenting, in *Perez* v. *Sharp*, 32 Cal. 2d. 711, 198 P. 2d. 17. In one of the concurring opinions in that case it was pointed out that, since California recognized a marriage performed in another state between persons of the white and colored races, such marriage could not have been considered by the Legislature to be vitally detrimental to the public health, morals and general welfare. In addition, the petitioners in that case affirmatively alleged that the statute there under attack was "arbitrary, capricious and without reasonable relation to any purpose within the competency of the State to effect," and offered substantial evidence in support of this allegation. It was only after a full analysis of these authorities (biological, psycological, socialogical, etc.) that a

majority of the Supreme Court of California resolved this question in favor of the petitioners. Thus, it is clear that the California Supreme Court did not hold the miscegenation statute in question *unconstitutional on its face.*

In 1944, in *Stevens* v. *United States,* 146 F. (2d.), 120, 123, the United States Circuit Court of Appeals for the Tenth Circuit, considering the identical question here raised, observed:

> "Marriage is a consentient covenant. * * * It is a domestic relation having to do with the morals and civilization of a people. It is an essential institution in every well organized society. It affects in a vital manner public welfare, and its control and regulation is a matter of domestic concern within each state. A state has power to prescribe by law the age at which persons may enter into marriage, the procedures and obligations which it creates, and its effects upon the property rights of both parties. *Maynard* v. *Hill,* 125 U. S. 190. And within the range permissible adoption of policies deemed to be promotive of the welfare of society as well as the individual members thereof, a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment."

This Honorable Court has rendered no decision at variance with the holding in *Stevens* v. *United States, supra.* This Court has on numerous occasions invoked the provisions of the Fourteenth Amendment to invalidate state legislation and decision with respect to political and civil rights, but it has not denied to the states the right to deal with their social and domestic problems and to legislate in regard to the marriage relation. On the contrary, this Court has been very careful to exclude that relation from

the effects of its holding. *Pace* v. *Alabama,* 106 U. S. 537; *Buchanan* v. *Worley,* 245 U. S. 60. Indeed, during the past year this Court refused an application for a writ of certiorari to review a determination of the Alabama courts that the miscegenation statute of that State was not antagonistic to the Fourteenth Amendment. *Jackson* v. *State, supra, cert. den.,* 348 U. S. 888.

In view of the total want of any evidence whatsoever in the case at bar, it is submitted that—to overturn the decision of the Supreme Court of Appeals of Virginia—it would be necessary for this Court, in effect, to take judicial notice that interracial marriages are not inimical to the public welfare of the States and thus not subject to legislative control, and that a racial classification designed to serve as a basis for regulations of this character are, *ipso facto,* unconstitutional. Such action by this Court would certainly be at variance with the findings of the Legislatures of a majority of the States, whose laws manifest a determination that interracial marriages are detrimental to the public health, morals and general welfare. From this circumstance alone, it would appear to be evident that the non-detrimental effect of interracial marriages is *not* a well known fact of common knowledge of which this Court should properly take judicial notice.

Moreover, in "The Race Question and the Negro" (1943), Father John LaFarge, discussing the subject of inter-racial marriage generally under the heading, "The Moral Aspect," observed:

> "(T)here are grave reasons against any general practice of intermarriage between the members of different racial groups. These reasons, where clearly verified, amount to a moral prohibition of such a practice.

"These arise from the great difference of condition which is usually experienced by the members of the respective groups. It is not merely a difference of poverty or riches, of lesser or greater political power, but the fact that identification with the given group is far-reaching and affects innumerable aspects of ordinary daily life.

"Where marriage is contracted by entire solitaries such an interracial tension is more easily borne, but few persons matrimonially inclined are solitaries. They bring with them into the orbit of married life their parents and brothers and sisters and uncles and aunts and the entire social circle in which they revolve. All of these are affected by the social tension, which in turn reacts upon the peace and unity of the marriage bond.

"When children enter the scene the difficulty is further complicated unless a complete and entirely self-sacrificing understanding has been reached beforehand. And even then the social effects may be beyond their control. * * *"

True it is that writings of contrary import may be found, but an examination of the references listed in both the majority and dissenting opinions in *Perez* v. *Sharp*, supra, demonstrate that the authorities are gravely at odds on the biological, psychological and sociological aspects of this question. Surely it is not incumbent upon the Legislatures of the various States to wait until there is a unanimity of scientific opinion in this field before enacting legislation of the type here under consideration.

Finally, counsel suggest that the question sought to be presented to this Court is no broader than that passed upon by the Supreme Court of Appeals of Virginia. Pre-

sented to the Virginia Supreme Court was the narrow question of whether or not the Virginia miscegenation statute was *unconstitutional on its face.* Not only has appellant failed to discharge the burden of demonstrating that the statute in question is unconstitutional, but he has not offered any evidence tending to support such a position. Indeed, appellant did not even raise this question, nor do his pleadings in this case contain any allegations which would have made such evidence material. The attack upon the validity of the Virginia statute in this case is embodied exclusively in appellant's naked assertion that the statute is unconstitutional on its face. On this point the text and decisional authorities are not in conflict, and the unbroken line of cases beginning in 1869, the very year after the Fourteenth Amendment was adopted, and continuing through 1954, clearly emasculate appellant's contention.

CONCLUSION

For the foregoing reasons, the appellee respectfully submits this statement showing that the questions upon which the decision in this case depends are so unsubstantial as to obviate further argument, and the appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the order of the court below.

Respectfully submitted,

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Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing appellee's Statement Opposing Jurisdiction and Motion to Dismiss to David L. Carliner, Esq., 612 Rupley Building, 815 King Street, Alexandria, Virginia, Counsel of Record for the Appellant, on this the 27th day of September, 1955.

A. A. BANGEL
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Attorney for Appellee

OCT 17 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 366

HAM SAY NAIM, *Appellant,*

vs.

RUBY ELAINE NAIM, *Appellee*

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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WILL MASLOW,
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Association on American Indian Affairs;
JACK WASSERMAN,
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FRANK CHUMAN AND EDWARD REISS,
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ANDREW REISS,
FRED T. STANT, JR.,
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SUPREME COURT OF THE UNITED STATES

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The questions posed by this appeal, the appellee says, are so unsubstantial that they need no further argument before this Court, and she has rested her motion to dismiss, or in the alternative, to affirm the decree below, upon that sole ground. (Rule 16(b) and (c), Revised Rules of the Supreme Court.)

Not without irony, the appellee relies, in part,[1] upon three decisions of this Court which declare that marriage creates "the most important relation in life",[2] that it results

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[1] Appellee's Statement, Page 5.

[2] *Maynard* v. *Hill,* 125 U. S. 190, 205.

in "social relations and social obligations and duties, with which government is necessarily required to deal",[3] and that it "involves the exercise by the States of powers of the most vital importance".[4]

Moreover, the appellee concedes[5] that this Court has never before passed upon the validity of the statutes which seek to interfere with marriage because the spouses are persons of different races.

Two reasons are given by the appellee in support of her argument that the questions posed here are not substantial. One is that "the unbroken line of cases beginning in 1869, the very year after the Fourteenth Amendment was adopted, and continuing through 1954 clearly emasculate the appellant's contention" (that the statute is unconstitutional on its face). (Appellee's Statement, Page 10).

Whatever unbroken line of cases there may be were not cited by the appellee. On the contrary, the six decisions of this Court relied upon by the appellee, *supra*, indicate, first, that the questions posed in this appeal have not been decided by the United States Supreme Court, and second, that the determination of the constitutional power of a state to dissolve marriages does, in fact, pose a substantial federal question. In *Maynard* v. *Hill*, the dissolution of the marriage was tested against the constitutional prohibition forbidding impairment of contracts. In *Reynolds* v. *United States*, the issue was whether a polygamous marriage was protected by the constitutional guaranty of religious freedom. *Sherrer* v. *Sherrer* involved the effect of the full faith and credit clause upon proceedings to determine marital status.

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[3] *Reynolds* v. *United States*, 98 U. S. 145, 165.

[4] *Sherrer* v. *Sherrer*, 334 U. S. 343, 354.

[5] Appellee's Statement, pp. 7, 8, citing *Pace* v. *Alabama*, 106 U. S. 583; *Buchanan* v. *Warley*, 245 U. S. 60, and *Jackson* v. *State*, 260 Ala. 698, 72 So. 2d 116, cert. denied, 348 U. S. 886.

For the first time in the constitutional history of the United States, the present appeal poses the question whether the equal protection and due process clauses of the Fourteenth Amendment inhibit the power of a state to dissolve a marriage upon the sole ground of the races of the spouses.

This Court has held that a state may not deny by reason of race the rights of its residents to follow ordinary occupations, to serve on petit or grand juries, to buy, sell, or occupy real property, to vote in primary as well as general elections, or to attend public schools.

Whether a marriage, "the most important relation in life", can be dissolved by a state because one spouse is Caucasian and the other is Chinese [6] manifestly poses a question at least equal in substance to the foregoing issues. In the context of these decisions by the Supreme Court, it denies reality to say that the question raised in this appeal is unsubstantial.

The second reason relied upon by the appellee is that in this appeal "the critical issue is the reasonableness of the legislative classification and the necessity for regulation", and that in the absence of evidence or facts within the judicial notice of the Court to challenge the classification, this Court should not "intervene in the present case". (Par. 4, Appellee's Statement).

The basic flaw in the appellee's argument is that it has by-passed the question of the state's power to act at all in the field of preserving the racial integrity of the white race. The question is not whether the classifications adopted within the "Act to Preserve Racial Integrity" are arbi-

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[6] It should be noted that the purpose of the statute requiring such dissolutions is to "preserve the integrity of the white race", (See Senate Bill 219, Senate Bills, Virginia Senate, 1924; *Wood* v. *Commonwealth*, 159 Va. 963, 965, 166 S. E. 477) and "to regulate the marriage relation so that it (the State) shall not have a mongrel breed of citizens". (See Opinion below, Statement as to Jurisdiction, Page 24.)

trary or without a reasonable relation to the purpose of the statute. The question rather is whether the purpose is within the competency of the state to effect. *Meyer* v. *Nebraska*, 262 U. S. 390, 399. The appellee's reasoning presupposes the validity of the purpose of the statute. *Oyama* v. *California*, 332 U. S. 633, 646.

The Court below did not fail to treat both issues. It explicitly upheld the validity of the purpose of the statute:

> "If the prevention of miscegenetic marriages is a proper governmental objective, and within the competency of the state to effect, which we hold it to be, then Section 20-54 of the Code, supra, under attack, is a valid enactment unless classification made by the statute is arbitrary and without reasonable relation to the purpose intended to be effected" (Statement as to Jurisdiction, Page 23).

The critical issue in this appeal, therefore, is whether the Court below is correct in holding that the "prevention of miscegenetic marriages is a proper governmental objective and within the competency of the state to effect".

Nor is the appellee correct in her assumption that the burden is upon the appellant to show that the racial classifications adopted by the statute are unreasonable. The decisions of this Court in *Hirabayashi* v. *United States*, 320 U. S. 81, 100, 101; *Korematsu* v. *United States*, 323 U. S. 214, 217; *Oyama* v. *California*, *supra*, and *Bolling* v. *Sharpe*, 347 U. S. 497, 499, have declared that racial distinctions are irrelevant, unjustified, inexcusable, odious, and constitutionally suspect, and that a pressing public necessity or exceptional circumstances must be shown to justify them. Obviously, the burden of showing such a necessity is upon those who seek to justify the racial distinctions.

Inasmuch as that burden has not been met by the appellee, her motion to dismiss the appeal or, in the alternative, to affirm the decree below, should be denied.

Respectfully submitted,

DAVID CARLINER,
Attorney for Appellant.

HERBERT MONTE LEVY,
American Civil Liberties Union;
WILL MASLOW,
American Jewish Congress;
ARTHUR LAZARUS AND RICHARD SCHIFTER,
Association on American Indian Affairs;
JACK WASSERMAN,
Association of Immigration and Nationality Lawyers;
FRANK CHUMAN AND EDWARD ENNIS,
Japanese-American Citizens League;
ANDREW REINER,
FRED T. STANT, JR.,
ALAN S. MIRMAN,
Of Counsel.

Proof of Service

I, David Carliner, attorney for Ham Say Naim, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of October, 1955, I served a copy of the foregoing Brief in Opposition to Appellee's Motion to Dismiss or Affirm on Ruby Elaine Naim, appellee herein, as follows:

By mailing a copy, in a duly addressed envelope, with postage paid to A. A. Bangel, Esq., her attorney of record, at his office at Law Building, Portsmouth, Virginia.

DAVID CARLINER,
Attorney for Appellant,
902 Warner Building,
Washington 4, D. C.

(4633-4)

No. 366. NAIM *v.* NAIM. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered "in clean-cut and concrete form, unclouded" by such problems. *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 584. The judgment is vacated and the case remanded to the Supreme Court of Appeals in order that the case may be returned to the Circuit Court of the City of Portsmouth for action not inconsistent with this opinion. *David Carliner, Herbert Monte Levy, Will Maslow, Arthur Lazarus, Richard Schifter, Jack Wasserman* and *Edward Ennis* for appellant. *A. A. Bangel* for appellee. Reported below: 197 Va. 80, 87 S. E. 2d 749.